

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of December, two thousand fifteen.

PRESENT:

DENNIS JACOBS,
PETER W. HALL,
SUSAN L. CARNEY,
Circuit Judges.

HOJATOLLAH FAILI, KADRINUR SEVAL
FAILI,
Petitioners,

v.

13-3349
NAC

LORETTA E. LYNCH, UNITED STATES
ATTORNEY GENERAL,
Respondent.

FOR PETITIONER: Joshua E. Bardavid, New York, New
York.

1 **FOR RESPONDENT:**

Stuart F. Delery, Assistant Attorney
General; Anthony C. Payne, Senior
Litigation Counsel; Liza S. Murcia,
Attorney, Office of Immigration
Litigation, Washington, D.C.

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7 UPON DUE CONSIDERATION of this petition for review of a
8 Board of Immigration Appeals ("BIA") decision, it is hereby
9 ORDERED, ADJUDGED, AND DECREED that the petition for review is
10 DENIED.

11 Petitioners Hojatollah Faili, a native of Iran and citizen
12 of Iran and Turkey, and his wife, Kadrinur Seval Faili, a native
13 and citizen of Turkey, seek review of an August 12, 2013,
14 decision of the BIA affirming a September 14, 2011, decision
15 of an Immigration Judge ("IJ") denying Petitioners'
16 applications for asylum, withholding of removal, and relief
17 under the Convention Against Torture ("CAT"). *In re Hojatollah*
18 *Faili, Kadrinur Seval Faili*, Nos. A098 977 380/381 (B.I.A. Aug.
19 12, 2013), *aff'g* Nos. A098 977 380/381 (Immig. Ct. N.Y. City
20 Sept. 14, 2011). We assume the parties' familiarity with the
21 underlying facts and procedural history in this case.

22 Petitioners do not challenge the agency's denial of asylum
23 or withholding of removal. Accordingly, the only portion of

1 the agency's decision that is before this Court is the denial
2 of deferral of removal to Turkey under the CAT. See *Yueqing*
3 *Zhang v. Gonzales*, 426 F.3d 540, 542 n.1, 546 n.7 (2d Cir. 2005).
4 Petitioners stated two bases for deferral of removal to Turkey:
5 a fear of torture by the Iranian government because Mr. Faili
6 had cooperated with the DEA, and a fear of torture by drug
7 smugglers that Mr. Faili helped convict.

8 Petitioners have not exhausted this claim to the extent
9 that they allege a fear of torture in Turkey at the hands of
10 the Iranian government. Petitioners must raise specific
11 issues with the BIA before raising them in this Court. See
12 *Foster v. INS*, 376 F.3d 75, 77-78 (2d Cir. 2004). Issue
13 exhaustion is mandatory where, as here, the Government points
14 out that the issue was not properly raised below. *Lin Zhong*
15 *v. U.S. Dep't of Justice*, 480 F.3d 104, 107 n.1 (2d Cir. 2007).
16 Petitioners failed to exhaust this particular CAT claim before
17 the BIA. Their brief stated only that "these individuals that
18 were arrested are very dangerous and have strong ties to the
19 government of Turkey, as well as Iran," and did not argue that
20 the Iranian government would reach them in Turkey and torture

1 them. Accordingly, we decline to consider this basis for CAT
2 deferral and address the merits of the claim only as to
3 Petitioners' fear of drug smugglers.

4 As an initial matter, the BIA's decision is far from clear
5 as to CAT deferral. Although the BIA acknowledged that a CAT
6 claim was raised and that Mr. Faili was granted deferral of
7 removal to Iran, it did not mention CAT relief with respect to
8 Turkey. Thus the BIA may have overlooked this claim.
9 Nevertheless, remand would be futile because the BIA affirmed
10 the IJ's adverse credibility determination, which is
11 dispositive of the CAT claim. *Xiao Ji Chen v. U.S. Dep't of*
12 *Justice*, 471 F.3d 315, 338 (2d Cir. 2006).

13 Deferral of removal under the CAT is a mandatory form of
14 relief that requires the applicant to show that he would more
15 likely than not be tortured in the proposed country of removal.
16 8 C.F.R. §§ 1208.16(c), 1208.17; *Khouzam v. Ashcroft*, 361 F.3d
17 161, 168 (2d Cir. 2004). Not all harm rises to the level of
18 torture; rather, it is an "extreme form of cruel and inhuman
19 treatment and does not include lesser forms of cruel, inhuman
20 or degrading treatment or punishment that do not amount to

1 torture.'" *San Chung Jo v. Gonzales*, 458 F.3d 104, 109 (2d Cir.
2 2006) (quoting 8 C.F.R. § 1208.18(a)(2)). Torture also
3 requires that "government officials know of or remain willfully
4 blind to an act and thereafter breach their legal responsibility
5 to prevent it." *Khouzam*, 361 F.3d at 171.

6 The IJ denied deferral of removal to Turkey for two reasons:
7 the adverse credibility finding and lack of evidence that the
8 Turkish government would acquiesce to any torture.
9 Petitioners do not challenge the adverse credibility
10 determination and it stands as a valid basis for the denial of
11 CAT relief. *Yueqing Zhang*, 426 F.3d at 542 n.1, 546 n.7; *Shunfu*
12 *Li v. Mukasey*, 529 F.3d 141, 146-47 (2d Cir. 2008) (concluding
13 that unchallenged credibility findings stand as valid basis for
14 the determination). "[A] petition for CAT relief may fail
15 because of an adverse credibility ruling rendered in the asylum
16 context where the factual basis for the alien's CAT claim was
17 the same as that rejected in his asylum petition." *Paul v.*
18 *Gonzales*, 444 F.3d 148, 157 (2d Cir. 2009).

19 The Faili's contend that their CAT claim can be established
20 independently of the credibility determination because of the

1 objective evidence that Mr. Faili was a DEA informant. This
2 objective evidence does not overcome the credibility problems
3 relating to their alleged fear of drug smugglers. Mr. Faili
4 was found not credible with respect to a number of facts
5 involving his work with the DEA and alleged fear of harm in
6 Turkey on that basis. Mr. Faili and the DEA agents gave
7 conflicting testimony about the number of threats that Mr. Faili
8 received and reported, and about who threatened him. Mr. Faili
9 claims that a Turkish newspaper article revealed his status as
10 an informant; but he failed to corroborate that claim by a copy
11 of the article or by evidence that he tried to locate it. Mr.
12 Faili said one of the DEA agents "definitely" saw the article,
13 but that agent could not recall it. And Mrs. Faili was evasive
14 when asked about her father's testimony that "there is nothing
15 to fear in Turkey." First she said her father must have
16 misunderstood, then she said she disagreed with him without
17 explaining why her view should be credited. Because the
18 agency's adverse credibility determination relates to the facts
19 and circumstances underlying the CAT claim, specifically
20 whether the alleged fear was credible, Mr. Faili's status as

1 a DEA informant does not alone warrant CAT deferral. *See Paul*,
2 444 F.3d at 157.

3 Moreover, as the IJ also found, Petitioners otherwise
4 failed to establish that they would be tortured "at the
5 instigation of, or with the consent and acquiescence of a public
6 official." 8 C.F.R. § 1208.18(a). One DEA agent testified
7 that the Turkish police increased patrols around Mr. Faili's
8 residence in response to his report of a threatening phone call
9 from his sister-in-law. The Failis have offered no evidence
10 to support their speculation have offered no evidence to support
11 their speculation that the Turkish government will no longer
12 offer them protection because Mr. Faili is no longer a DEA
13 informant. *Mu Xiang Lin v. U.S. Dep't of Justice*, 432 F.3d 156,
14 160 (2d Cir. 2005) (denying CAT relief because petitioner
15 offered "no additional particularized evidence"); *Mu-Xing Wang*
16 *v. Ashcroft*, 320 F.3d 130, 144 (2d Cir. 2003) (denying CAT relief
17 where petitioner "in no way established that someone in his
18 particular alleged circumstances is *more likely than not* to be
19 tortured" (emphasis in original)).

1 For the foregoing reasons, the petition for review is
2 DENIED. As we have completed our review, any stay of removal
3 that the Court previously granted in this petition is VACATED,
4 and any pending motion for a stay of removal in this petition
5 is DISMISSED as moot. Any pending request for oral argument
6 in this petition is DENIED in accordance with Federal Rule of
7 Appellate Procedure 34(a)(2), and Second Circuit Local Rule
8 34.1(b).

9 FOR THE COURT:

10 Catherine O'Hagan Wolfe, Clerk